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I. Scotland

Martin Hogg

A. LEGISLATION

1. Apologies (Scotland) Act 2016

- 1** The Apologies (Scotland) Act 2016 has the simple, focused purpose of providing that in any civil legal proceedings (with a few specified exceptions¹) an apology made outside the proceedings (a) is not admissible as evidence of anything relevant to determination of liability in connection with the proceedings and (b) cannot be used in any other way to the prejudice of the person who made the apology.² The Act defines an apology as “any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence”.³ The Act does not have retrospective effect.⁴
- 2** The provisions of the Act encompass not only spur-of-the-moment apologies issued directly after the occurrence of an accident or injury (such as apologies made in the aftermath of road traffic accidents) but also prepared apologies issued by commercial parties (such as those issued by manufacturers of goods which have injured customers), healthcare providers, and government bodies. The crucial point is that such apologies, which are often welcomed by injured parties and can assist in helping such parties to cope with the ongoing effects of their injuries, can now be made by the party or parties which caused the injury without fear that such an apology may amount to an admission of liability. Though some scepticism has been expressed as to whether the passage of

¹ These are listed in section 2. They include defamation proceedings: see section 2(1)(d).

² See section 1 of the Act.

³ Section 3.

⁴ Section 4.

the Act will have much practical effect,⁵ the adoption of the Act is in line with similar legislation in other jurisdictions⁶ and Scottish commentators have generally welcomed its passage.

B. CASES

1. *AJ Allan (Blairnyle) Ltd v Strathclyde Fire Board*, Court of Session (Inner House), 13 January 2016, [2016] CSIH 3, 2016 SC 304, 2016 SLT 253: No liability in Negligence of Fire Brigade for Extinguished Fire which Reignited and Destroyed Building

a) Brief Summary of the Facts

- 3** The pursuer owned a farmhouse which caught fire. The fire brigade were called and attended the incident. The fire was extinguished at about 3 p.m. In the early hours of the following morning, the fire reignited and burned down the farmhouse. The pursuer alleged that the fire had restarted as a result of smouldering timbers in the roof space of the farmhouse. It raised an action in damages against the Fire Board, arguing that the fire brigade owed the pursuer a duty of care, and that they had negligently breached this duty: once the fire appeared to have been extinguished, the fire brigade should (it was argued) have used a thermal imaging camera to locate any remaining questionable areas. It was further argued that the firefighters should have maintained a regular check on the farmhouse to make sure that the fire had been truly extinguished.
- 4** The defenders accepted that they owed a limited duty of care to the public at large, but argued that this duty was limited to taking reasonable care that they did not make matters worse through their conduct. As the fire service were not liable in damages if they failed to attend a fire, it would be unprincipled to suggest that a fire service which attended and sought to extinguish a fire could be liable in damages (except where it negligently caused fresh injury).
- 5** At first instance, the judge allowed the pursuer a proof before answer (that is, a trial of the facts before a debate on the law). The defenders appealed against this decision.

⁵ See, for instance, Douglas S K Maxwell, “The Apologies (Scotland) Act 2016: an innovative opportunity in the twenty first century or an unnecessary development?” 2016 *Journal of Personal Injury Law (JPIL)* 79–89, discussed below at paragraph 62.

⁶ The various states and territories of Australia, for instance, have legislation relating to the legal status of apologies.

b) Judgment of the Court

- 6** On appeal, the appeal court allowed the appeal and dismissed the action against the defenders. The appeal court held that public bodies might be held liable for negligence only if they made matters worse or if they had assumed a responsibility to a specific party. The present action was similar to the English conjoined cases of *Capital and Counties plc v Hampshire County Council*.⁷ In one of those joined cases, where a fire reignited after being extinguished, the fire brigade were held not to have owed any duty of care to a property owner in respect of a failure to ensure that the fire had been properly extinguished.
- 7** In support of its decision, the appeal bench cited a number of reasons: (1) the fire service, in attending calls, should not be taken to have assumed a responsibility to householders – rather, they are carrying out their statutory functions and public duty; (2) public policy considerations mitigated against the imposition of a duty of care, including the consideration that it might encourage a more defensive approach by the fire brigade to the conduct of their business; (3) a fire brigade owes a duty to the public at large, not just the individual property owner, as fire may spread to other properties; (4) there is no common law duty on the fire brigade to attend a fire, and it would therefore be unprincipled to create a duty in circumstances where the brigade did so attend a fire; (5) it would be unfortunate were the Scottish courts to adopt a different approach to that which was well established in English law;⁸ and (6) the fire brigade had not by its omission caused the fire to reignite.⁹

c) Commentary

- 8** This judgment is noteworthy for a number of reasons. First, because the judges of the Inner House specifically assert that the Scottish courts ought to follow House of Lords and UK Supreme Court judgments¹⁰ supportive of the finding of no liability in the *Capital and Counties* case, rather than certain first instance (Outer House) Scottish judgments which tend to the opposite view. Lady Paton states:

“It is my opinion that the carefully developed, policy-based, more restrictive approach currently approved and adopted by the UK Supreme Court must be followed by the Scottish courts (contrary to the views expressed in the Outer

⁷ [1997] Queen’s Bench (QB) 1004.

⁸ For reasons (1) to (5), see judgment of Lady Paton at paras 27–31.

⁹ For reason (6), see judgment of Lord Drummond Young at para 64.

¹⁰ Lady Paton mentions *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 Weekly Law Reports (WLR) 1057, and *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 2 WLR 343.

House in *Duff*,¹¹ *Gibson v Orr*,¹² and *Burnett*,¹³ but in keeping with a recent opinion of Lord McEwan in *Mackay v Scottish Fire and Rescue Service*¹⁴ ...”¹⁵

Her Ladyship specifically singles out the previous first instance decision of *Burnett* for criticism (on a number of points), such that it would now seem unsafe to rely on this case in future argument before the courts. The present judgment is thus a Scottish affirmation of the cautious and conservative English approach to the liability of the fire brigade.

- 9 Second, it is noteworthy that the appeal court judges express scepticism with the view advanced in *Burnett* that there is no difference between acts and omissions, pointing out that previous House of Lords judgments have emphasised that there *is* a distinction to be drawn between avoiding causing harm to others and failing to prevent harm being caused by some other agent. This view led one of the judges, Lord Drummond Young, to treat the question of the fire board’s potential liability as

“one of causation. If loss is caused by the acts of third parties or the forces of nature, a public authority such as the board cannot be said to have caused the loss”.¹⁶

The soundness of this specific analysis of the decision is questionable. The conduct of the fire brigade in this case was undoubtedly one of the causes-in-fact of the destruction of the building, albeit not the only one: but for their failure to ensure that the fire had not been entirely extinguished, the building would not have been destroyed. There may be sound reasons for deciding not to attribute liability to this cause-in-fact, but presenting that decision as one of causation is to oversimplify the matter.

- 10 The other reasons advanced by the appeal court offer, in general, a more sound analysis for its conclusions, although reason number (4) listed earlier – that there is no common law duty on the brigade to attend a fire, and it would therefore be unprincipled to create a duty in circumstances where the brigade did so attend a fire – also seems somewhat suspect. There are surely many circumstances in which a party may have no duty to act but where, if it chooses to do so, liability may arise in relation to how it acts. Consider for instance professionally qualified persons (e.g. lawyers, accountants): such persons are usually at liberty to decide whether or not to act for a prospective client in relation to a matter, but having decided to act are then under a duty to act with care in the conduct of the client’s business. That being so, the logic embodied in reason (4)

¹¹ *Duff v Highlands and Islands Fire Board* 1995 Scots Law Times (SLT) 1362.

¹² 1999 Session Cases (SC) 420.

¹³ *Burnett v Grampian Fire and Rescue* [2007] CSOH 3, 2007 SLT 61.

¹⁴ [2015] CSOH 55, 2015 SLT 342.

¹⁵ Para 26.

¹⁶ Para 64.

seems somewhat suspect. Otherwise, the reasons advanced for the decision seem defensible, and it is clear that public policy considerations continue to play the significant role in this field of potential liability.

2. *William Tracey Ltd v SP Transmission plc*, Court of Session (Outer House), 19 January 2016, [2016] CSOH 14, 2016 SLT 678: Liability of Statutory Energy Provider for Damages in Respect of Encroachment onto Private Land

a) Brief Summary of the Facts

- 11** The pursuer, William Tracey Ltd, was formerly the tenant and latterly the owner of land in Linwood, Paisley. The previous owner of the land had granted to the defender, SP Transmission plc (an electricity provider), a voluntary “wayleave” (a right granted to another party over land) allowing it to lay electricity cables over the land and to support these via a steel lattice tower. When ownership of the land was acquired by the pursuer, it refused to grant a new wayleave to the defender, and issued a notice of removal (under section 8 of the Electricity Act 1989) in respect of the cables and tower on its land. Thereafter the defender applied to the Scottish Ministers for a “necessary wayleave” under Schedule 4 of the 1989 Act: such wayleaves may be sought from and granted by the government to statutory providers of electricity if the wayleave is “necessary or expedient” for their business, and the grant of such a necessary wayleave does not require the consent of the owner of the relevant land. The Scottish Ministers consented to the defender’s request and granted the necessary wayleave.
- 12** The pursuer subsequently raised an action of damages against the defender, arguing that, for the period between its purchase of the land and the grant of the necessary wayleave, the defender had had no right to have its electricity cables or tower on the pursuer’s land. It argued that the presence of such equipment constituted the delict of encroachment. The defender argued that there had been no unlawful encroachment.

b) Judgment of the Court

- 13** The judge (Lord Brodie) held that: (1) in principle, installing and keeping electricity cables and equipment on the land of another is an actionable encroachment, unless the landowner has consented; (2) however, the purpose of the relevant provisions of the Electricity Act is to provide a comprehensive regime dealing with the problem of an electricity line and equipment having been installed by virtue of a consent which has come to an end or is otherwise ineffective. In such a case, the Act provides (in Schedule 4) for a “temporary continuation” of a prior voluntary wayleave, and the only action open to an objecting landowner is to give a notice of removal of the sort which the pursuer had issued

in this case. In consequence, delictual damages are *not* available during the period of such a temporary continuation, the common law right to these having been ousted by the statutory regime; (3) more fundamentally, having regard to the correct interpretation of the relevant provisions of the Electricity Act, the defender had not committed the delict of encroachment at all. That being the case, the judge dismissed the case against the defender.

c) Commentary

- 14 The judgment serves first as a useful reminder that, unless some authority exists for the keeping of items of property on another's land, the delict of encroachment is committed by such an act, and the encroaching party will be liable in damages for any losses caused. Although the rights of the landowner to exclusive possession and occupation of land derive from its title to the land, and are thus property law rights, the offending act is classed as a delict: "Any permanent or quasi-permanent intrusion by something onto the land which in any way impinges on enjoyment of the right of exclusive possession, constitutes the delict of encroachment".¹⁷ In English law, such conduct would be treated as a form of private nuisance.
- 15 The judgment is of interest for two further reasons. First, in relation to a question which courts are regularly required to address in various contexts: to what extent does a statutory regime exclude delictual remedies that might otherwise be available at common law? In this instance, the court was faced with opposing arguments about the extent to which the common law remedies available for encroachment had been displaced in circumstances covered by the 1989 Act's regime. Both parties were agreed that, in relation to encroachment by electricity cables and related equipment, the common law remedy of an order of removal had been replaced by the statutory remedy of giving notice to remove; but they were at odds as to whether the common law remedy of damages remained in place where a new landowner refused to renew a voluntary wayleave and had given such notice to remove. There is a limited remedy under the Act of compensation for landowners in respect of whom a necessary wayleave is granted, but, as Lord Brodie recognised, "there can be said to be a lacuna in the absence of provision for compensation in respect of the interim period between the giving of notice and the Scottish Ministers' decision".¹⁸ Despite this lacuna, his Lordship felt that the intention of Parliament appeared to have been to provide a comprehensive regime. In such an intended comprehensive regime, therefore, there was no place for the common law remedy of damages for encroachment. The approach bears some similarity with courts' decisions in relation to other statutory regimes, although in many such other cases no damages are available because a possible duty of care owed at common law is held to have been ousted by the statutory regime. By contrast, in this case, the duty of care question was

¹⁷ Para 21.

¹⁸ Para 31.

not at issue because the subject matter related to the nominate delict of encroachment and not to negligence.

- 16** Second, the court goes further. The judge comments not only on the remedies available to those who suffer encroachments in circumstances covered by the 1989 Act's regime (these remedies are governed by the statutory regime, not the common law), but also on the more fundamental point of whether any wrong has been committed at all during the process covered by the statutory scheme. Lord Brodie's view is that what might otherwise be wrongful is legitimated by the terms of the Act: until the process triggered by the notice to remove is resolved, the statute says that "the licence holder shall not be obliged to comply with [the notice to remove]".¹⁹ This provision was held by the court to clothe what would otherwise be an unlawful encroachment with lawful authority, the result being that there is no encroachment. Given this conclusion, the court's discussion referred to in the previous paragraph about remedies seems to have been rather redundant: if no wrong is committed, one hardly needs to discuss whether common law remedies can or cannot be activated.
- 17** The judgment represents, somewhat ironically, an example of the encroachment of statutory law onto the common law delict of encroachment. This statutory encroachment is twofold, both in relation to the remedies that would otherwise be available at common law, but also (more fundamentally) in relation to legitimating conduct and thus preventing it from being wrongful to begin with.

**3. *Esso Petroleum Ltd v Scottish Ministers and others*, Court of Session (Outer House), 21 January 2016, [2016] CSOH 15, 2016 SCLR 539:
Liability of Owner of Land for Environmental Contamination Caused by Contractor Engaged by the Landowner**

a) Brief Summary of the Facts

- 18** The first defenders, the Scottish Government (represented by its Ministers), decided to construct a new section of the M74 motorway near Glasgow. They appointed Glasgow City Council as the managing agent for the project. The Council engaged the third defender, a joint venture group of companies, as main contractors for the project. Part of the motorway site comprised land (called "the Albion site") formerly owned by the second defenders, a company called Brenntag Inorganic Chemicals Ltd, which land was subsequently acquired by the Scottish Government. The land had been previously used for the storage of quantities of chemicals. A site report prepared in relation to the Albion site identified the risk of contamination to groundwater and surface water as a result of the chemicals. During clearance of the Albion site, the presence of further hydrocarbon contaminants was detected, and remedial action recommended. A

¹⁹ Schedule 4, para 8(2).

plan was formulated to funnel groundwater off the site. Unfortunately, this funnelling failed to prevent contamination of a neighbouring area of land owned by the pursuers, Esso Petroleum Ltd.

- 19** The pursuers raised an action against the various defenders based on nuisance and alternatively on their failure to exercise reasonable care. The pursuers argued that the first defenders were vicariously liable for the conduct of the joint venture. They sought (1) decree ordaining the first defenders to prevent any further escape of hydrocarbons on to their land; (2) decree ordaining the defenders to carry out and complete works within the Esso site to prevent recurrence, remove the contaminants and remediate the damage; and (3) damages amounting to around £2,800,000.
- 20** At the first hearing, the judge dismissed the case against the former owner of the Albion site, Brenntag Inorganic Chemicals. In relation to the remainder of the claim, he ordered a preliminary enquiry into three questions. The most important of these questions was whether the operations carried out on the Albion site were inherently hazardous, and whether therefore the first defenders were unable to delegate to another party their duty to prevent harm.

b) Judgment of the Court

- 21** The judge appointed to decide the specified questions (Lord Tyre) made the following decision in relation to the question of whether a landowner is subject to a non-delegable responsibility for inherently hazardous operations carried out on its land. He summarised the law of Scotland on the matter as follows: (1) liability of an employer for negligence or nuisance caused by an independent contractor extends to operations carried out on a person's land which cause or are likely to cause damage or injury to a neighbouring property; (2) however, it is not enough to prove that damage to a neighbour's land is likely to occur if a potentially hazardous operation is performed without taking adequate precautions. Liability arises only where either (a) the operation will or is likely to cause damage to the neighbour's land however much care is exercised, or (b) it is necessary to take steps in the carrying out of the operation to prevent damage to the neighbour's land, and those steps are not taken by the landlord either personally or on his instructions; (3) liability cannot be avoided simply by giving instructions to an independent contractor; and (4) the reasonableness of the steps taken specifically to avoid damage to neighbouring land is to be assessed at the time when the operation was undertaken, and not with the benefit of hindsight after damage or injury has occurred.²⁰ On the related legal question of whether Scots law renders a *contractor* liable to a neighbouring landowner for damage caused by the negligence or nuisance created by a

²⁰ Para 23.

subcontractor carrying out an inherently hazardous operation, Lord Tyre held that it did not.²¹

- 22** On the application of the above law to the facts of the case, the judge held that (1) the operations carried out on the Albion site were inherently hazardous, given their potential to create a risk to human health; and (2) the first defenders were *not* relieved of potential liability for damage to the pursuer's land caused by negligence or nuisance by virtue of having engaged the third defender as an independent contractor and having instructed it to take appropriate and adequate precautionary measures. In the light of these findings, the judge ordered representations to be made on the further procedure appropriate for determining the outcome of the case.

c) Commentary

- 23** The principal legal question discussed in this judgment raises difficult conceptual issues about the extent to which harm caused by certain activities carried out on land can be disclaimed by a landowner who has employed another party to carry out the activities. Landowners are *prima facie* responsible for any nuisances caused by their land. There is an exception to this rule which holds that the employer of an independent contractor is *not* liable for injury caused to a third party by the fault of the contractor,²² however that rule is itself subject to an exception (settled in English law) that the landowner cannot escape liability in relation to activities which are inherently hazardous.²³ The exception from the exception has long troubled legal commentators, however: Professor Atiyah, for instance, pointed out the difficulty with the concept of something being "inherently hazardous":

"The truth of the matter is that damage or injury can be caused by the execution of practically any work, if it is done without due care, and conversely, that practically anything can be done without causing injury if sufficient care is taken in doing it."²⁴

Lord Tyre added the further observation that the activities capable of description as inherently hazardous "appears to be a legal construct without any basis in scientific categorisation".²⁵ Concerns with the concept have led the English Court of Appeal to attempt to keep the exception as "narrow as possible".²⁶ Lord Tyre purports not to express a general opinion on the issue of "the extent

²¹ Paras 25–27.

²² *Stephen v Thurso Police Commissioners* (1876) 3 R 535.

²³ The exception was borrowed from the English decision of *Dalton v Angus* (1881) LR 6

²⁴ P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) 332, quoted by Lord Tyre at para 16 of his judgment.

²⁵ Para 17.

²⁶ *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hesse GmbH* [2009] Queen's Bench (QB) 725.

to which the exception is recognised in Scots law”, but given that he then goes on to refer to “the true meaning of the exception ... in circumstances in which it applies”,²⁷ it would seem that his judgment can be taken as affirming the existence of the exception in Scots law at least to the extent described in the four points listed at **21** above.

- 24** The obvious difference in the practical effect of the exception between English and Scots law is that in Scotland it is clear that proof of nuisance (and not just of negligence) requires the demonstration of fault (*culpa*) on the part of the defender: it is not a delict of strict liability.²⁸ This requirement serves to provide added protection to Scottish landowners faced with possible liability for the undertaking of inherently hazardous activities on their land: they must be shown to have been at fault in undertaking the activities or in delegating the activities to another party.
- 25** On the facts of this case, Lord Tyre’s decision seems the right one. As to the law, it would be welcome to see a fresh restatement of the principles by the Inner House of the Court of Session.

4. *Kennedy v Cordia (Services) LLP*, United Kingdom Supreme Court, 10 February 2016, [2016] UKSC 6, 2016 SC (UKSC) 59, [2016] 1 WLR 597: Liability of Employer for Injury Sustained by Employee who Slipped on Icy Surface while Working

a) Brief Summary of the Facts

- 26** The facts were as narrated at the previous stage of this litigation, reported in the 2014 Yearbook:²⁹ Ms Kennedy (the appellant in the appeal) was working for Cordia Services (the respondent) as a carer, providing care to elderly and infirm persons in their own homes. She and a colleague had visited a terminally ill, elderly, housebound person in order to provide her with personal care. The weather was freezing and icy, and snow was falling. While walking down a path towards the home of the housebound person, the appellant, who was wearing ankle boots made from synthetic waterproof fabric with a flat but ridged rubber sole, lost her footing, fell and injured her wrist. She sued her employer, alleging that the employer was in breach of its duties towards her under the Management of Health and Safety at Work Regulations 1999,³⁰ the Personal

²⁷ Para 23.

²⁸ See judgment of Lord Tyre, para 24.

²⁹ [Insert reference to discussion of the case from the 2014 Yearbook].

³⁰ Regulation 3(1) of the 1999 Regulations provides that “[e]very employer shall make a suitable and sufficient assessment of—(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work ... for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions”.

Protective Equipment at Work Regulations 1992,³¹ and at common law. The judge at first instance, having ordered a proof restricted to the issue of liability, found her employer liable to make reparation to Ms Kennedy in respect of her injury. The employer appealed against that decision, and this appeal was successful before the Inner House of the Court of Session. The Inner House held that the evidence of an expert witness who testified on behalf of Ms Kennedy was largely in admissible because (i) the judge at first instance had required no expertise to assess whether the employer was under a duty to take the suggested preventative measures, and (ii) Ms Kennedy had been under no greater risk of injury than an ordinary member of the public, so there was no duty to provide protective footwear that might have prevented the injury. Ms Kennedy further appealed against that decision to the Supreme Court.

b) Judgment of the Court

- 27** The Supreme Court overturned the judgment of the Inner House, and restored the finding at first instance of liability on the part of the employer. The justices held that the evidence of the expert witness *had* been admissible, useful expertise having been acquired by those familiar with health and safety issues. They further held that the judge at first instance had been entitled to find (i) a breach of regulation 3 of the 1999 Regulations, given the likely risk of slipping, the absence of consideration of individual protective measures by the employer, and the lack of appropriate instructions to employees,³² as well as (ii) a breach of the 1992 Regulations, given that, had there been a suitable and sufficient risk assessment involving a proper consideration of the risks of slipping and falling, this would have identified a number of devices available to reduce that risk, but none had been provided.³³ As to common law liability, the justices observed that the context in which common law employer's liability had to be applied had changed and it was now generally recognised that a reasonably prudent employer would conduct a risk assessment so it could take reasonable precautions to avoid injury to its employees; the common law duty could include seeking out knowledge of risks which are not in themselves obvious³⁴.

c) Commentary

- 28** The reasoning of the Inner House's judgment was criticised in the 2014 Yearbook. The Inner House's view in relation to the 1992 Regulations that "a breach of the regulation 3 duty cannot, in a case where it is averred that the failure to

³¹ Regulation 4(1) of the 1992 Regulations provides that "[e]very employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective".

³² Paras 90–92.

³³ Paras 98–100.

³⁴ Paras 109–111.

take a safety precaution caused injury, be said to be the direct cause of that injury”³⁵ was shaky, and it is heartening to see the Supreme Court pointing out that “where an employee has been injured as a result of being exposed to a risk against which she should have been protected by the provision of PPE [personal protective equipment], and it is established that she would have used PPE if it had been provided, it will normally be reasonable to infer that the failure to provide the PPE made a material contribution to the causation of the injury”.³⁶ The rejection of the Inner House’s supposed requirement that breach of the regulations be a direct cause, or the sole cause, is a sensible one, and bolsters the underlying duty imposed on employers by the regulations.

- 29** Another suspect piece of reasoning of the Inner House was its view that the 1992 Regulations were directed only at “risks at work” (i.e. risk created or increased by the nature of the work), rather than other sorts of risks to which a worker might be exposed in the same way as any other member of the public is exposed. That reasoning was used by the Inner House to suggest that the risk of slipping on an icy surface was not a work-related risk. As was pointed out in the 2014 Yearbook, that makes little sense: someone may, for instance, be exposed to risks while driving a motorbike in his free time, but that surely does not mean that, if that person drives a motorbike while working, his employer is not therefore required, under the Regulation, to provide him with a motorcycle helmet, just because the risk of not wearing one is a risk to which the employee would also be exposed in his private life. The Supreme Court justices sensibly reject the Inner House’s fallacious reasoning, pointing out that the Regulations require only that the employee must be exposed to the risk during the time when she is at work, that is during the time when she is in the course of her employment. They do not require that the risk be of a different sort to risks that may arise outside the workplace.
- 30** The decision of the Supreme Court to overturn the Inner House’s judgment is to be welcomed. It reinforces the critical importance to employers of ensuring that a thorough workplace risks assessment is carried out in relation to individual employees, and appropriate action taken to deal with risks identified in such an exercise. It also recognises that the field of health and safety is growing in significance and that therefore those who have developed expertise in the field may attain the status of expert witnesses so far as legal adjudicatory processes are concerned.

³⁵ [2014] CSIH 76, para 19.

³⁶ Para 119.

5. *NRAM plc v Steel and Bell & Scott LLP*, Court of Session (Inner House), 19 February 2016, [2016] CSIH 11, 2016 SC 474, 2016 SLT 285, [2016] PNLR 20: Professional Negligence Claim against Solicitor for Negligent Misstatement

a) Brief Summary of the Facts

- 31** The pursuers, NRAM plc, are commercial lenders. They granted loan facilities to Headway Caledonian Limited (“HCL”), a client of the first defender, Ms Steel, who was a solicitor. The loan related to HCL’s purchase of four commercial premises, in return for which HCL granted a security over the whole property. In response to a communication by NRAM indicating that they wished to discharge the security in relation to a portion of the whole property, Ms Steel replied by an email which she indicated had attached to it “discharges for signing and return as well as the whole loan is being paid off for the estate and I have a settlement figure for that”. In reliance on this request, NRAM were misled by Ms Steel into discharging the entire security when it ought to have been left in place in relation to two of the units. NRAM argued that this error had been induced by Ms Steel’s email, whose contents amounted to a negligent misstatement for which she, and the firm by whom she was employed (the second defenders), should be held responsible. HCL having gone into liquidation, NRAM claimed damages amounting to approximately £458,000 from the defenders. At first instance, the judge held that Ms Steel had owed no duty of care to NRAM when she made the erroneous statements because (1) it had not been reasonable for them to rely on Ms Steel’s statements without checking their accuracy, and (2) Ms Steel could not reasonably have foreseen that they would rely on her statements without carrying out such a check.

b) Judgment of the Court

- 32** On appeal, the appeal court (by a 2:1 majority) overturned the judgment at first instance, and held that the first defender had assumed a responsibility in delict to the pursuers in relation to the statements she had made. It was plainly within the reasonable contemplation of a solicitor in the position of Ms Steel that her email would be relied on as being accurate and, importantly, that it would cause the execution and return of the discharge of security attached to it.³⁷ A reasonable solicitor would have foreseen reliance on the statements made and accordingly an outcome where the discharges were signed and returned.³⁸ In these circumstances, the imposition of a duty of care was fair, just, and reasonable.³⁹ The appeal court thus affirmed the finding of liability made at first instance as well as the award of damages.

³⁷ Per Lady Smith, at para 50.

³⁸ Ibid.

³⁹ Per Lady Smith, para 52.

c) Commentary

- 33** This decision concerns the liability of a solicitor in negligence for pure economic loss in respect of statements made to a party which had loaned sums of money to the solicitor's client. Had the lenders been properly legally advised by its own solicitors, it is very likely that they would not have made the error they did in reliance on the solicitor's misleading request. However, the lenders were not legally represented. The judge at first instance held that the solicitor knew (or ought to have known) this, and this finding was affirmed on appeal.⁴⁰ Though a solicitor normally only owes a duty of care to his or her own client, liability in pure economic loss to persons other than the client can arise: as the House of Lords' judgment in *White v Jones*⁴¹ shows, such liability can arise from circumstances which disclose an assumption of responsibility by the solicitor to the relevant party.
- 34** As Lady Paton rightly points out in her leading judgment, whether such a duty arises in a specific case turns very much on the facts of the case (the majority and minority judges disagreeing on whether, on the facts, it was reasonable for the pursuer to rely on the statements made). A court requires to examine "the precise circumstances in which the communication came to be made"⁴² in order to decide whether an assumption of responsibility can be held to have been made. The language of assumption of responsibility is not very felicitous, suggesting as it does a form of voluntary obligation when, in reality, what is at issue is a decision by a court as to whether liability should be imposed as a result of certain conduct.⁴³ Delictual liability is not ultimately a voluntary species of obligation (like contract and unilateral promise), so that the language of assumption of responsibility masks what is in reality a decision by courts that liability *ought* to be imposed. Nonetheless, this judgment reaffirms the courts' view that such language is thought to be an appropriate way of analysing the creation of delictual liability.
- 35** There are some interesting remarks about whether, in a case such as this, use of the *Hedley Byrne*⁴⁴ and *White v Jones* assumption of responsibility criterion is

⁴⁰ See judgment of Lady Smith, para 13.

⁴¹ [1995] 2 Appeal Cases (AC) 207.

⁴² Per Lady Smith, at para 43.

⁴³ As Lord Brodie rightly notes in his dissenting judgment, "“assumption of responsibility is a concept or conclusion arrived at by consideration of a variety of factors rather than a description of anyone's state of mind” (see Lord Brodie at para 69). Lord Slynn previously remarked in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 654: “The phrase means simply that the law recognises there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by law”. This observation underlines the infelicity of the language used in describing the approach, which is not in reality a test but rather an *ex post facto* conclusion.

⁴⁴ *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465.

the best approach, whether the *Caparo Industries*⁴⁵ tripartite test (applying the criteria of (i) foreseeability, (ii) proximity, and (iii) fairness, justice, and reasonableness) is better, or whether an approach based on incremental development of categories is more appropriate. That question has excised prior courts, as it did for instance the House of Lords in *Customs and Excise Commissioners v Barclays Bank plc*.⁴⁶ In that case, Lord Bingham remarked that the assumption of responsibility test was a “sufficient but not necessary condition of liability”,⁴⁷ Lord Hoffmann that it was “critical to decide whether the defendant rather than someone else assumed responsibility for the accuracy of the information”,⁴⁸ and Lord Rodger that assumption of responsibility was “the touchstone of liability for pure economic loss”,⁴⁹ that it had “very real value” as a “criterion of liability” in many cases, and that it “may be decisive in many situations”.⁵⁰ These somewhat differing perspectives are all noted in the judgment of Lady Paton in this case, who offers no decisive view of whether one approach is more appropriate than the others. She confines herself to echoing Lord Rodger’s view that there is “real value” in the assumption of responsibility approach, and her own judgment employs both that test and the *Caparo* tripartite approach, the application of each test affirming the conclusion of the other of liability in the circumstances of this case. However, as argued above, the language of assumption of responsibility is misleading, and masks the underlying nature of a court’s enquiry; the language of the *Caparo* test at least has the merit of expressly stating what it is that the court has to consider when applying the test.

- 36** A detailed dissenting judgment was given by one of the appeal court judges, Lord Brodie, who believed that there were no grounds for disturbing the judge at first instance’s finding that it was not reasonable for the pursuer to rely on the representation. Given this dissent, it was likely that a further appeal would be launched; it was, leave to appeal to the UK Supreme Court having been granted on 8 November 2016.

⁴⁵ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

⁴⁶ [2007] 1 AC 181.

⁴⁷ Per Lord Bingham, at para 4.

⁴⁸ Per Lord Hoffmann, at para 35.

⁴⁹ Per lord Rodger, at para 49.

⁵⁰ Per Lord Rodger, at para 52.

6. *Renfrew Golf Club v Motocaddy Ltd*, Court of Session (Inner House), 20 July 2016, [2016] CSIH 57, 2016 SLT 781: Product liability – Whether Supplier of Electric Golf Trolley Liable for Damage to Building in Fire Caused by defective Trolley

a) Brief Summary of the Facts

37 The pursuers were a golf club who operated from club premises in Renfrew. The defenders were suppliers of electric motorised golf trolleys, which they imported from China and then branded with their own label. One of the pursuers' members had purchased one of these trolleys, which after use he had left at the entrance to the changing rooms in the clubhouse. In the early hours of the following day, a fire occurred at the clubhouse, causing approximately £500,000 of damage. The pursuers alleged that the fire was caused by wear and tear to the unprotected cabling in the trolley, which in exposing the wiring had caused a short circuit which led to the fire. The pursuer claimed that this amounted to a product defect present at the point of supply, as the design did not include adequate protection against electrical faults.

38 The pursuer claimed (1) that the defenders were in breach of a common law duty of care owed to them by the defenders, and (2) that the defenders were liable under the Consumer Protection Act 1987 (which provides for strict liability in respect of defective products). The defenders claimed that no duty of care was owed at common law, and that statutory liability was excluded by virtue of section 5(3) of the 1987 Act, which provided that

“A person shall not be liable ... for any loss or damage to any property which, at the time it is lost or damaged, is not —

(a) of a description of property ordinarily intended for private use, occupation or consumption; and

(b) intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption.”

The defenders argued that the clubhouse was not property ordinarily intended for “private use”.

39 At first instance, the judge held (1) that there was insufficient proximity between the parties to found a duty of care at common law, and that it was not fair, just and reasonable to impose such a duty, and (2) that a clubhouse which was used by over 700 members and by others was not property “ordinarily intended for private use”. He therefore held the defenders not to be liable under the 1987 Act for the damage caused.

b) Judgment of the Court

- 40** On appeal, the appeal court affirmed the decision at first instance. As regards the common law duty of care, there was no proximity between a supplier of a golf trolley and the owner of a clubhouse in which the trolley happened to be, three years after the supply, and over which the supplier had no control.⁵¹ Whether or not its location at a clubhouse was foreseeable, it might foreseeably have been placed in any number of locations, to each of which it might cause indeterminate damage were it to catch fire. Furthermore, given the regime of the 1987 Act, and the fact that a contract of sale had governed the purchase of the trolley, there was little room for the common law of delict to be extended to a new situation such as the present, where the legislature had declined to act.⁵²
- 41** As regards the case under the product liability regime of the 1987 Act, the clubhouse was not property ordinarily intended for private use: the underlying idea behind this regime was that, whereas there should be liability for damage to property used in a person's private life, notably, but not exclusively, in a domestic setting and whether that person was a consumer of the product or not, that liability should not extend to property used by what might loosely be described as economic entities (whether private or not). The pursuers were an economic operation, albeit that they were a "private club". For these reasons, the case under the 1987 Act was irrelevant.

c) Commentary

- 42** The judgment is of interest for two principal reasons. First, it provides useful illumination of the idea of damaged property having a "private use" so far as liability under the 1987 Act is concerned. Second, it offers some interesting observations on the continuing availability of common law, *Donoghue v Stevenson*,⁵³ delictual liability for defective products in an era where the statutory liability of the 1987 Act exists, and on possible claims at common law in respect of physical damage caused by a defective product to a party not in a proximate relationship with the supplier of the product.
- 43** As regards the meaning of "private use" property under section 5(3) of the 1987 Act, the court in considering what meaning should be attributed to this idea looked at the underlying intention of the EU product liability directive upon which the 1987 Act is based. The court considered that this background suggests that what is important is whether or not the property is used for individual/family/small group of friends' use as opposed to communal use, based upon financial considerations, by a large number of members of the public. The con-

⁵¹ Para 33.

⁵² Para 34.

⁵³ 1932 SC(HL) 31.

cern thus seems to be both with the size of the group which might use the property as well as the relationship of that group to the owner. That might well produce a sensible answer in most cases, but one wonders what view would be taken if the two considerations came into conflict, i.e. what if only one person at a time used the property but such persons had no personal connection to the owner (but used the property in return for payment)? The answer, one suspects, would be that such use would also not be “private use”, the presence of a hire charge being determinative of a commercial rather than a private use. In any event, the approach taken by the appeal bench to this question seems a robust and sensible one.

- 44** The second interesting issue is the extent to which use can be made of common law liability for defective products in cases where (i) a contract for the purchase of the product existed between consumer and supplier and (ii) liability might conceivably exist under the 1987 Act if the necessary requirements for such liability are fulfilled. The 1987 Act does not purport to replace the common law, *Donoghue v Stevenson* liability for defective products, so in theory a claim might be made under either form of liability. Nor does the presence of a contract necessarily exclude the possibility of delictual liability. The appeal court bench however cites the prior comment of Lord Rodger that

“Where the position of the parties is regulated ... by a mixture of contract and statute *prima facie* there is little room for the common law of delict to impose a duty of care...”⁵⁴

in order to suggest that the combined presence of such features mitigates against the creation of a duty of care at common law, adding that “it would no doubt be difficult for the defenders to obtain limitless product liability insurance, whereas the pursuers ... could have insured the premises with reasonable ease”.⁵⁵

- 45** The decision of the appeal bench negating a common law duty of care is worthy of analysis. The focus of the bench on the question of the proximity of the pursuers and defenders is noteworthy: traditionally, in cases involving personal injury or damage to property, courts have not stressed proximity as a separate requirement, inferring it from foreseeability of harm (and in this case the type

⁵⁴ *Mitchell v Glasgow City Council* 2009 SC(HL) 21 at para 51.

⁵⁵ Para 34. No other mention is made of insurance arrangements in the judgment, and it might therefore be assumed from a reading of this judgment that no buildings insurance policy was in place over the clubhouse, which would be a curious want of prudence on the part of the club were that so. The judgment at first instance ([2015] CSOH 173), however, reveals that counsel for the pursuers made reference in his oral pleadings to the pursuer’s insurers and the recovery of their costs, which suggests the opposite, i.e. that there was a policy of insurance in place over the building: see para 15 of the first instance judgment.

of harm and the mechanism by which it was caused appear to have been reasonably foreseeable). But this was not a classic case of harm caused to a consumer of products: the damage in this case was caused to the premises in which the consumer had left the product, owned by a different party. The concern appears to have been that the claim was being made by a peripheral party, one who fell within an indeterminate class of potential claimants.

- 46** The court noted that there was scant prior authority dealing with a similar sort of case: the court mentions only two mid-twentieth century cases that were cited to it.⁵⁶ The court states that these two cases cannot be used as a springboard for extending liability of suppliers of defective products for damage caused to property “anywhere that the product might have been left by third parties”.⁵⁷ However, the first of these two cases (*Stennett v Hancock & Peters*) bears some resemblance to the facts of this case, in that a repairer of a motor vehicle was held liable to a member of the public when the repaired part came loose and struck the member of the public. Liability was founded on *Donoghue v Stevenson*, and the judge did not trouble himself with the worry that anyone might conceivably have been injured by the defective repair (compare the concern of the appeal bench in this case that the injury might be caused to any number of premises). *Stennett* has been founded on in subsequent cases,⁵⁸ so it cannot be dismissed as an isolated authority or as a novel case. Given this, it can be argued that the dismissal by the appeal court of a common law claim on the basis that a finding of liability would amount to a “substantial increase in existing known fields of liability”⁵⁹ seems questionable. The court’s dismissal of common law duty thus seems somewhat peremptory.

7. *Taylor v Quigley and others*, Court of Session (Outer House), 21 December 2016, [2016] CSOH 178: Liability of Committee of Golf Club for Injuries Sustained by a Member on the Club Premises

a) Brief Summary of the Facts

- 47** The pursuer, who was a member of the Colville Park Golf Club, sustained serious injuries to his leg when he stepped on a manhole cover between the clubhouse and the first tee, falling partly into the manhole. The pursuer raised an action of damages against eight named members of the Executive Committee of the golf club (the first to eighth defenders) and Tata Steel (UK) Ltd (the ninth

⁵⁶ *Stennett v Hancock & Peters* [1939] 2 All ER 578 and *Farrugia v Great Western Railway* [1947] 2 All ER 565.

⁵⁷ Para 32.

⁵⁸ Including *Robinson v Department of Environment* [1989] Northern Ireland Law Reports (NI) 372; *Audrey Power v Bedford Motor Co Ltd* [1959] IR (Irish Reports) 359; *Herschthal v Stewart & Aldern Ltd* [1939] 4 All ER 123.

⁵⁹ Para 33.

defender), who owned the land in question and had appointed the second defender (the club secretary). The defenders challenged the relevancy of the action, claiming that the eight committee members could not be liable to the pursuer in a personal capacity and that the case against the ninth defender was irrelevant.

b) Judgment of the Court

- 48** The judge (Lord Uist) held that (1) the pursuer could not sue any of the first eight defenders in their capacity as members of the club or of its Executive Board. There was a rule against members of a club suing each other for injury allegedly arising in the course of membership, since there was no distinction between the members and the pursuer would in effect be suing himself, but this rule did not afford a defence if a duty of care had arisen independently of membership;⁶⁰ (2) On the face of it the pursuer was suing the first to eighth defenders as members of the club: if they had not been members of the Executive Board they would not have been sued. In order to plead a relevant case, therefore, he had to make sufficient averments that they owed him a duty of care independently of their membership; (3) As the pursuer had failed to aver any relevant basis for such an independent duty of care, his case against the first eight defenders was irrelevant and had to be dismissed; (4) As regards the ninth defender, they were sued only on the basis that they were vicariously liable for the acts and omissions of the club secretary. As the club secretary owed no duty of care to the pursuer, it followed that the ninth defenders could not be held vicariously liable for his acts or omissions. A principal could not be liable to a third party for the negligence of his agent if the agent owed no duty to that third party. The case against the ninth defender was therefore also dismissed.

c) Commentary

- 49** This is the second noteworthy case of 2016 to involve golf clubs. In this judgment, the matter of interest relates to the liability of committee members of unincorporated associations to fellow members of their club. Unincorporated associations (golf clubs often fall into this legal category) have no separate legal personality: they are merely the collection of individual members who at any one time make up the membership of the association. This judgment reaffirms the view that club members cannot sue committee members of the club in their representative capacity, because that capacity means that they represent all of the members, including the member who wishes to sue. The logic of this is that a member who wished to sue the committee would, in effect, be trying to sue him or herself, which is not permitted.
- 50** The exception to this basic rule relates to cases where, in the words of *Charlesworth & Percy on Negligence* (quoted by the judge):

⁶⁰ Para 34.

“a duty of care has arisen independently of membership. So, the court can look to the circumstances, including the terms upon which a club officer or other servant or agent of the club has been appointed, or the club rules, to see whether some responsibility has been conferred upon that individual which caused a duty of care to arise.”⁶¹

The result is that, in some cases, courts have been willing to consider committee members liable in delict/tort where a specific duty has been delegated to such member(s). So, in *Grice v The Stourport Tennis, Hockey and Squash Club*,⁶² the Court of Appeal thought that a possible reading of the Club rules was that responsibility had been delegated to the committee to maintain the premises and that this might give rise to a duty of care owed to individual members.⁶³ It therefore permitted the plaintiff to add the relevant committee members as defendants in the action. This approach did not assist Mr Taylor in the present case because the judge thought that there was no evidence of any such delegated responsibility sufficient to support a duty of care owed to individual members.

- 51 Given the judge’s assessment of the factual position of the committee members in relation to individual club members, the decision seems a correct application of the law. However, there is the more fundamental question of whether the law needs to be changed. The current legal rules leave members of unincorporated associations exposed to the hazard of injury without recourse in delict to any party owing a duty of care in respect of such injury. In 2009, the Scottish Law Commission made recommendations (thus far unimplemented in law reform) that not-for-profit unincorporated associations which have more than two members and a written constitution should have separate legal personality.⁶⁴ Had those recommendations been implemented, Mr Taylor’s negligence claim might have been successful.

8. Personal Injury

- 52 As in previous years, there continues to be a steady stream of personal injury claims coming before the Scottish courts. A good number of these concern road traffic accidents, medical negligence, and the liability of employers for injuries caused to employees.

⁶¹ 13th edition (2014), at paras 3-52–3-53. Quoted by the judge at para 4 of his judgment.

⁶² [1997] EWCA Civ 1139.

⁶³ See judgment of Otton LJ.

⁶⁴ Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217, 2009), recommendations 1–3.

- 53** Since Scots law was changed in the Damages (Asbestos-related Conditions) (Scotland) Act 2009 to allow claims to be made in respect of presently symptomless pleural plaques, there have been a few reported cases each year dealing with the evaluation of claims for that medical condition. So, for instance, in 2016, one may note the case of *Harris v Advocate General for Scotland*,⁶⁵ in which the court considered the proper method of calculation of damages for pleural plaques giving rise to an increased risk of developing mesothelioma and lung cancer.
- 54** In relation to road traffic accidents, one interesting reported case is that of *Robinson v Scottish Borders Council*,⁶⁶ in which a roads authority was sued in respect of metal strips placed on a road some years previously which caused a cyclist to fall off his bicycle and injure himself. In finding for the cyclist, the judge rejected the view expressed in oral evidence made on behalf of the Council that, because the metal strips were designed into the bridge when it had been widened in 1990, no further thought required to be given to them. The judge's rejection of this view is a reminder that the mere fact that a defect in a road surface is a design fault rather than one caused by failure properly to maintain the road surface does not mean that the continued presence of the defect is not negligent.
- 55** There continue to be cases dealing with the lamentable topic of historic child abuse. One such case was *DK v The Marist Brothers* [2016] CSOH 54. In this case, because the alleged events took place before the provisions of the Prescription and Limitation (Scotland) Act 1973 were amended to exclude the operation of long negative prescription (a twenty year period) to personal injury claims, the judge held that the claim of the pursuer had prescribed. A lot of such claims relate to facts occurring *after* the Act was amended (in 1984), meaning that claimants have a better chance of recovery. However, even in such post-1984 cases, the claim is still subject to a triennial limitation period, albeit that this can be waived by a court if it "seems to [the court] equitable" to do this. The limitation is typically not waived in cases where a long time has passed and witnesses have died or else may have very poor memories of the facts, as this is often thought to be prejudicial to a fair trial of the facts. That approach however is likely to be amended in the near future: the Scottish Parliament currently has before it the Limitation (Childhood Abuse)(Scotland) Bill. If adopted, this Bill will remove the triennial limitation period in respect of personal injury claims in cases where the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred, and the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries. So, in future years, reports of many of these cases may tell a different story.

⁶⁵ [2016] CSOH 49, 2016 SLT 572.

⁶⁶ [2016] CSOH 47, 2016 SLT 435.

C. LITERATURE

1. Elspeth Reid, “Different and yet the same? Delictual liability of roads authorities in Scotland and in England”, *Juridical Review*, 2016, 1–18

- 56 In this article, the author (one of the foremost authorities on delict in Scots law) undertakes a comparative examination of the state of the law relating to the delictual liability of roads authorities in Scotland and England. Following a review of the relevant statutes and cases, the author concludes that the statutory sources from which Scottish and English road authorities’ powers and duties derive are separate, and the interplay between those sources and the common law rules is dissimilar. Formerly, this meant major substantive difference between the two jurisdictions. However, English law has aligned itself more closely to Scots law, abandoning the immunity for failure to repair, and integrating liability for failure to clear snow and ice within the general rule on maintenance of the highways.
- 57 Given the frequency with which road traffic injuries continue to come for adjudication before the Scottish courts, this article is an important and helpful contribution to a proper understanding of the applicable law, and will be especially helpful in assisting practitioners who may wish to cite cases from English law in any Scottish claim.

2. Roddy Macleod, “Has Fire Service liability been extinguished in Scotland?”, *Juridical Review*, 2016, 201–211

- 58 In this article, the author critiques the first of the Scottish cases discussed in the current volume, *A J Allan (Blairnyle) Ltd v Strathclyde Fire Board*.⁶⁷ The author writes from the unusual perspective of being both an advocate and a “retained firefighter” (that is, someone who has full time employment in another field, but assists from time-to-time with firefighting).
- 59 The author argues that the effect of the case is a narrowing in the scope of liability of the fire service in Scotland, an approach arrived at (in part) by public policy considerations. The tone of the author’s commentary is broadly supportive of this approach, concerned as he is at potentially defensive behaviour of the fire service were liability not to be narrowly constrained.

⁶⁷ See paragraphs 3–10 above.

3. Eleanor Russell, “Revisiting the liability of fire services”, Scots law Times, 2016, (News) 99–111

- 60** The case of *A J Allan (Blairnyle) Ltd v Strathclyde Fire Board* was also analysed in this article. The author is supportive of the decision of the Inner House, commenting that it is a “welcome and unanimous statement concerning the direction of the law in relation to the liability of fire services. Any doubt that the law in Scotland differs from that in England is dispelled.”⁶⁸ The author sees as significant Lord Drummond Young’s view that policy and proximity cannot be looked at independently, but should be seen as forming parts of a single evaluative exercise.

4. Mat Campbell, “Somerville v Harsco Infrastructure Ltd: transferred intent and the scope of vicarious liability”, Edinburgh Law Review, 2016, 211–216

- 61** In this article, the author considers the Sheriff Court decision in *Somerville v Harsco Infrastructure Ltd*,⁶⁹ in which the court held that an employer was not vicariously liable for jocular conduct of one of its employees which had injured another employee. The author analyses recent Scottish decisions, at various levels of the courts, which have considered the role to be played by the “close connection” test in determining vicarious liability in delict. He concludes that there are clear differences of opinion between the courts (and in academic writing) as to the precise status of the test, and that a full restatement of the correct position by the Inner House of the Court of Session is needed.

5. Douglas S K Maxwell, “The Apologies (Scotland) Act 2016: an innovative opportunity in the twenty first century or an unnecessary development?”, Journal of Personal Injury Law, 2016, 79–89

- 62** In this article, the author considers whether the Apologies (Scotland) Act 2016 (discussed above at paragraphs 1–2) is a welcome development in Scots law. The author is sceptical of the benefit that the passage of the Act may bring, commenting that:

“The intention of the Act should be commended but serious concerns remain about its ability to make any difference to claimants and whether it will have any real effect on the number of cases brought in Scotland. The Act suffers from its inherently abstract nature and the limited number of detailed studies undertaken in Scotland and internationally on whether apologies can actually

⁶⁸ At 110.

⁶⁹ 2015 Green’s Weekly Digest (GWD) 38-607.

be an effective vehicle for resolving disputes. Taken as a whole, it remains unlikely that the Act will bring any real benefit to Scotland.”⁷⁰

The author cautions the English legal system to be wary about too quickly following in Scotland’s footsteps, suggesting that it would be sensible to observe how matters develop in Scotland.

⁷⁰ At 89.